

SECOND REGULAR SESSION

SENATE BILL NO. 1194

94TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR GOODMAN.

Read 1st time February 26, 2008, and ordered printed.

TERRY L. SPIELER, Secretary.

5213S.02I

AN ACT

To repeal sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo, and to enact in lieu thereof nine new sections relating to punishment for certain crimes against a child under the age of twelve, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo, are repealed and nine new sections enacted in lieu thereof, to be known as sections 565.005, 565.006, 565.035, 565.040, 565.425, 565.430, 565.435, 566.030, and 566.060, to read as follows:

565.005. 1. At a reasonable time before the commencement of the first stage of any trial of murder in the first degree, **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age of twelve**, at which the death penalty is not waived, the state and defendant, upon request and without order of the court, shall serve counsel of the opposing party with:

(1) A list of all aggravating or mitigating circumstances as provided in [subsection 1 of] section 565.032 **for murder in the first degree or section 565.415 for forcible rape of a child under the age of twelve or forcible sodomy of a child under the age of twelve**, which the party intends to prove at the second stage of the trial;

(2) The names of all persons whom the party intends to call as witnesses at the second stage of the trial;

(3) Copies or locations and custodian of any books, papers, documents, photographs or objects which the party intends to offer at the second stage of the trial. If copies of such materials are not supplied to opposing counsel, the party shall cause them to be made available for inspection and copying without order

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

17 of the court.

18 2. The disclosures required in subsection 1 of this section are
19 supplemental to those required by rules of the supreme court relating to a
20 continuing duty to disclose information, the use of matters disclosed, matters not
21 subject to disclosure, protective orders, and sanctions for failure to comply with
22 an applicable discovery rule or order, all of which shall also apply to any
23 disclosure required by this section.

 565.006. 1. At any time before the commencement of the trial of a
2 homicide [offense], **forcible rape of a child under the age of twelve, or**
3 **forcible sodomy of a child under the age of twelve**, the defendant may,
4 with the assent of the court, waive a trial by jury and agree to submit all issues
5 in the case to the court, whose finding shall have the force and effect of a verdict
6 of a jury. Such a waiver must include a waiver of a trial by jury of all issues and
7 offenses charged in the case, including the punishment to be assessed and
8 imposed if the defendant is found guilty.

9 2. No defendant who pleads guilty to a homicide [offense], **forcible rape**
10 **of a child under the age of twelve, or forcible sodomy of a child under**
11 **the age of twelve**, or who is found guilty of a homicide [offense], **forcible rape**
12 **of a child under the age of twelve, or forcible sodomy of a child under**
13 **the age of twelve** after trial to the court without a jury shall be permitted a
14 trial by jury on the issue of the punishment to be imposed, except by agreement
15 of the state.

16 3. If a defendant is found guilty of murder in the first degree, **forcible**
17 **rape of a child under the age of twelve, or forcible sodomy of a child**
18 **under the age of twelve** after a jury trial in which the state has not waived the
19 death penalty, the defendant may not waive a jury trial of the issue of the
20 punishment to be imposed, except by agreement with the state and the court.

21 4. Any waiver of a jury trial and agreement permitted by this section shall
22 be entered in the court record.

 565.035. 1. Whenever the death penalty is imposed in any case, and upon
2 the judgment becoming final in the trial court, the sentence shall be reviewed on
3 the record by the supreme court of Missouri. The circuit clerk of the court trying
4 the case, within ten days after receiving the transcript, shall transmit the entire
5 record and transcript to the supreme court together with a notice prepared by the
6 circuit clerk and a report prepared by the trial judge. The notice shall set forth
7 the title and docket number of the case, the name of the defendant and the name

8 and address of his attorney, a narrative statement of the judgment, the offense,
9 and the punishment prescribed. The report by the judge shall be in the form of
10 a standard questionnaire prepared and supplied by the supreme court of
11 Missouri.

12 2. The supreme court of Missouri shall consider the punishment as well
13 as any errors enumerated by way of appeal.

14 3. With regard to the sentence, the supreme court shall determine:

15 (1) Whether the sentence of death was imposed under the influence of
16 passion, prejudice, or any other arbitrary factor; and

17 (2) Whether the evidence supports the jury's or judge's finding of a
18 statutory aggravating circumstance as enumerated in subsection 2 of section
19 565.032 or **subsection 2 of section 565.435** and any other circumstance found;

20 (3) Whether the sentence of death is excessive or disproportionate to the
21 penalty imposed in similar cases, considering both the crime, the strength of the
22 evidence and the defendant.

23 4. Both the defendant and the state shall have the right to submit briefs
24 within the time provided by the supreme court, and to present oral argument to
25 the supreme court.

26 5. The supreme court shall include in its decision a reference to those
27 similar cases which it took into consideration. In addition to its authority
28 regarding correction of errors, the supreme court, with regard to review of death
29 sentences, shall be authorized to:

30 (1) Affirm the sentence of death; or

31 (2) Set the sentence aside and resentence the defendant to life
32 imprisonment without eligibility for probation, parole, or release except by act of
33 the governor; or

34 (3) Set the sentence aside and remand the case for retrial of the
35 punishment hearing. A new jury shall be selected or a jury may be waived by
36 agreement of both parties and then the punishment trial shall proceed in
37 accordance with this chapter, with the exception that the evidence of the guilty
38 verdict shall be admissible in the new trial together with the official transcript
39 of any testimony and evidence properly admitted in each stage of the original
40 trial where relevant to determine punishment.

41 6. There shall be an assistant to the supreme court, who shall be an
42 attorney appointed by the supreme court and who shall serve at the pleasure of
43 the court. The court shall accumulate the records of all cases in which the

44 sentence of death or life imprisonment without probation or parole was imposed
45 after May 26, 1977, or such earlier date as the court may deem appropriate. The
46 assistant shall provide the court with whatever extracted information the court
47 desires with respect thereto, including but not limited to a synopsis or brief of the
48 facts in the record concerning the crime and the defendant. The court shall be
49 authorized to employ an appropriate staff, within the limits of appropriations
50 made for that purpose, and such methods to compile such data as are deemed by
51 the supreme court to be appropriate and relevant to the statutory questions
52 concerning the validity of the sentence. The office of the assistant to the supreme
53 court shall be attached to the office of the clerk of the supreme court for
54 administrative purposes.

55 7. In addition to the mandatory sentence review, there shall be a right of
56 direct appeal of the conviction to the supreme court of Missouri. This right of
57 appeal may be waived by the defendant. If an appeal is taken, the appeal and
58 the sentence review shall be consolidated for consideration. The court shall
59 render its decision on legal errors enumerated, the factual substantiation of the
60 verdict, and the validity of the sentence.

565.040. 1. In the event that the death penalty provided in this chapter
2 is held to be unconstitutional, any person convicted of murder in the first degree,
3 **forcible rape of a child under the age of twelve, or forcible sodomy of**
4 **a child under the age of twelve** shall be sentenced by the court to life
5 imprisonment without eligibility for probation, parole, or release except by act of
6 the governor, with the exception that when a specific aggravating circumstance
7 found in a case is held to be unconstitutional or invalid for another reason, the
8 supreme court of Missouri is further authorized to remand the case for
9 resentencing or retrial of the punishment pursuant to subsection 5 of section
10 565.036.

11 2. In the event that any death sentence imposed pursuant to this chapter
12 is held to be unconstitutional, the trial court which previously sentenced the
13 defendant to death shall cause the defendant to be brought before the court and
14 shall sentence the defendant to life imprisonment without eligibility for
15 probation, parole, or release except by act of the governor, with the exception that
16 when a specific aggravating circumstance found in a case is held to be
17 inapplicable, unconstitutional or invalid for another reason, the supreme court
18 of Missouri is further authorized to remand the case for retrial of the punishment
19 pursuant to subsection 5 of section 565.035.

565.425. 1. Except as provided in subsections 2, 3, and 4 of this section, no forcible rape of a child under the age of twelve offense may be tried together with any offense other than forcible rape of a child under the age of twelve and no forcible sodomy of a child under the age of twelve offense may be tried together with any offense other than forcible sodomy of a child under the age of twelve. In the event of a joinder of forcible rape of a child under the age of twelve offenses or forcible sodomy of a child under the age of twelve offenses, all offenses charged which are supported by the evidence in the case shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of forcible rape of a child under the age of twelve of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other forcible rape of a child under the age of twelve or offense other than forcible rape of a child under the age of twelve committed against that individual. A count charging any offense of forcible sodomy of a child under the age of twelve of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other forcible sodomy of a child under the age of twelve or offense other than forcible sodomy of a child under the age of twelve committed against that individual. The state shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they are properly joined under subsection 1 of this section, either:

(1) Separate offenses other than forcible rape of a child under the age of twelve or separate offenses of forcible rape of a child under the age of twelve committed against different individuals;

(2) Separate offenses other than forcible sodomy of a child under the age of twelve or separate offenses of forcible sodomy of a child under the age of twelve committed against different individuals.

3. (1) When a defendant has been charged and proven before trial to be a prior offender pursuant to chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than forcible rape of a child under the age of twelve, that offense may be tried and submitted to the trier together with any forcible rape of a

38 child under the age of twelve charge with which it is lawfully joined.
39 In such case the judge shall assess punishment on any offense joined
40 with a forcible rape of a child under the age of twelve charge according
41 to law and, when the trier is a jury, it shall be instructed upon
42 punishment on the charge of forcible rape of a child under the age of
43 twelve in accordance with section 565.430.

44 (2) When a defendant has been charged and proven before trial
45 to be a prior offender pursuant to chapter 558, RSMo, so that the judge
46 shall assess punishment and not a jury for an offense other than
47 forcible sodomy of a child under the age of twelve, that offense may be
48 tried and submitted to the trier together with any forcible sodomy of
49 a child under the age of twelve charge with which it is lawfully joined.
50 In such case the judge shall assess punishment on any offense joined
51 with a forcible sodomy of a child under the age of twelve charge
52 according to law and, when the trier is a jury, it shall be instructed
53 upon punishment on the charge of forcible sodomy of a child under the
54 age of twelve in accordance with section 565.430.

55 4. When the state waives the death penalty for a forcible rape of
56 a child under the age of twelve offense or forcible sodomy of a child
57 under the age of twelve offense, that offense may be tried and
58 submitted to the trier together with any other charge with which it is
59 lawfully joined.

565.430. 1. Where forcible rape of a child under the age of twelve
2 or forcible sodomy of a child under the age of twelve is charged but not
3 submitted or where the state waives the death penalty, the submission
4 to the trier and all subsequent proceedings in the case shall proceed as
5 in all other criminal cases with a single stage trial in which guilt and
6 punishment are submitted together.

7 2. Where forcible rape of a child under the age of twelve or
8 forcible sodomy of a child under the age of twelve is submitted to the
9 trier without a waiver of the death penalty, the trial shall proceed in
10 two stages before the same trier. At the first stage, the trier shall
11 decide only whether the defendant is guilty or not guilty of any
12 submitted offense. The issue of punishment shall not be submitted to
13 the trier at the first stage. If an offense is charged other than forcible
14 rape of a child under the age of twelve in a count together with a count
15 of forcible rape of a child under the age of twelve, the trial judge shall

16 assess punishment on any such offense according to law, after the
17 defendant is found guilty of such offense and after he finds the
18 defendant to be a prior offender pursuant to chapter 558, RSMo. If an
19 offense is charged other than forcible sodomy of a child under the age
20 of twelve in a count together with a count of forcible sodomy of a child
21 under the age of twelve, the trial judge shall assess punishment on any
22 such offense according to law, after the defendant is found guilty of
23 such offense and after he finds the defendant to be a prior offender
24 pursuant to chapter 558, RSMo.

25 3. If the trier at the first stage of a trial where the death penalty
26 was not waived finds the defendant guilty of forcible rape of a child
27 under the age of twelve or forcible sodomy of a child under the age of
28 twelve, a second stage of the trial shall proceed at which the only issue
29 shall be the punishment to be assessed and declared. Evidence in
30 aggravation and mitigation of punishment, including but not limited to
31 evidence supporting any of the aggravating or mitigating
32 circumstances listed in subsection 2 or 3 of section 565.435, may be
33 presented subject to the rules of evidence at criminal trials. Such
34 evidence may include, within the discretion of the court, evidence
35 concerning the victim and the impact of the crime upon the family of
36 the victim and others. Rebuttal and surrebuttal evidence may be
37 presented. The state shall be the first to proceed. If the trier is a jury,
38 it shall be instructed on the law. The attorneys may then argue the
39 issue of punishment to the jury, and the state shall have the right to
40 open and close the argument. The trier shall assess and declare the
41 punishment at life imprisonment without eligibility for probation,
42 parole, or release except by act of the governor:

43 (1) If the trier finds by a preponderance of the evidence that the
44 defendant is mentally retarded; or

45 (2) If the trier does not find beyond a reasonable doubt at least
46 one of the aggravating circumstances set out in subsection 2 of section
47 565.435; or

48 (3) If the trier concludes that there is evidence in mitigation of
49 punishment, including but not limited to evidence supporting the
50 mitigating circumstances listed in subsection 3 of section 565.435,
51 which is sufficient to outweigh the evidence in aggravation of
52 punishment found by the trier; or

53 (4) If the trier decides under all of the circumstances not to
54 assess and declare the punishment at death. If the trier is a jury it
55 shall be so instructed.

56 If the trier assesses and declares the punishment at death it shall, in its
57 findings or verdict, set out in writing the aggravating circumstance or
58 circumstances listed in subsection 2 of section 565.435 which it found
59 beyond a reasonable doubt. If the trier is a jury, it shall be instructed
60 before the case is submitted that if it is unable to decide or agree upon
61 the punishment the court shall assess and declare the punishment at
62 life imprisonment without eligibility for probation, parole, or release
63 except by act of the governor or death. The court shall follow the same
64 procedure as set out in this section whenever it is required to
65 determine punishment for forcible rape of a child under the age of
66 twelve or forcible sodomy of a child under the age of twelve.

67 4. Upon written agreement of the parties and with leave of the
68 court, the issue of the defendant's mental retardation may be taken up
69 by the court and decided prior to trial without prejudicing the
70 defendant's right to have the issue submitted to the trier of fact as
71 provided in subsection 3 of this section.

72 5. As used in this section, the terms "mental retardation" or
73 "mentally retarded" refer to a condition involving substantial
74 limitations in general functioning characterized by significantly
75 subaverage intellectual functioning with continual extensive related
76 deficits and limitations in two or more adaptive behaviors such as
77 communication, self-care, home living, social skills, community use,
78 self-direction, health and safety, functional academics, leisure and
79 work, which conditions are manifested and documented before eighteen
80 years of age.

81 6. The provisions of this section shall only govern offenses
82 committed on or after August 28, 2008.

 565.435. 1. In all cases of forcible rape of a child under the age
2 of twelve or forcible sodomy of a child under the age of twelve for
3 which the death penalty is authorized, the judge in a jury-waived trial
4 shall consider, or he or she shall include in his or her instructions to
5 the jury for it to consider:

6 (1) Whether an aggravating circumstance or circumstances
7 enumerated in subsection 2 of this section is established by the

8 evidence beyond a reasonable doubt; and

9 (2) If an aggravating circumstance or circumstances is proven
10 beyond a reasonable doubt, whether the evidence as a whole justifies
11 a sentence of death or a sentence of life imprisonment without
12 eligibility for probation, parole, or release except by act of the
13 governor. In determining the issues enumerated in this subdivision
14 and subdivision (1) of this subsection, the trier shall consider all
15 evidence which it finds to be in aggravation or mitigation of
16 punishment, including evidence received during the first stage of the
17 trial and evidence supporting any of the aggravating or mitigating
18 circumstances set out in subsections 2 and 3 of this section. If the trier
19 is a jury, it shall not be instructed upon any specific evidence which
20 may be in aggravation or mitigation of punishment, but shall be
21 instructed that each juror shall consider any evidence which he or she
22 considers to be aggravating or mitigating.

23 2. Aggravating circumstances for a forcible rape of a child under
24 the age of twelve or forcible sodomy of a child under the age of
25 twelve shall be limited to the following:

26 (1) The offense was committed by a person with a prior record
27 of pleading to or being found guilty of forcible rape of a child under the
28 age of twelve or forcible sodomy of a child under the age of twelve, or
29 the offense was committed by a person who has pleaded guilty to or
30 been found guilty of one or more serious assaultive criminal offenses;

31 (2) The offense was committed while the offender was engaged
32 in the commission or attempted commission of another unlawful rape
33 or sodomy;

34 (3) The offender by his act of forcible rape of a child under the
35 age of twelve or forcible sodomy of a child under the age of twelve
36 knowingly created a great risk of death to more than one person by
37 means of a weapon or device which would normally be hazardous to the
38 lives of more than one person;

39 (4) The offender committed the offense for himself or another,
40 for the purpose of receiving money or any other thing of monetary
41 value from the victim of the forcible rape or forcible sodomy or
42 another;

43 (5) The offender caused or directed another to commit forcible
44 rape of a child under the age of twelve or forcible sodomy of a child

45 under the age of twelve or committed forcible rape of a child under the
46 age of twelve or forcible sodomy of a child under the age of twelve as
47 an agent or employee of another person;

48 (6) The raped or sodomized individual was a witness or potential
49 witness in any past or pending investigation or past or pending
50 prosecution, and was raped or sodomized as a result of his or her status
51 as a witness or potential witness;

52 (7) The offense was committed during the commission of a crime
53 which is part of a pattern of criminal street gang activity as defined in
54 section 578.421, RSMo;

55 (8) The offense was committed outrageously, wantonly vile,
56 horribly, or inhumanely in that it involved torture or depravity of
57 mind;

58 (9) The offense was committed by a person in, or who escaped
59 from, the lawful custody of a peace officer or place of lawful
60 confinement;

61 (10) The offense was committed while the defendant was engaged
62 in the perpetration or was aiding or encouraging another person to
63 perpetrate or attempt to perpetrate a felony of any degree of homicide,
64 burglary, robbery, kidnapping or any felony offense under chapter 195,
65 RSMo.

66 3. Mitigating circumstances shall include the following:

67 (1) The defendant has no significant history of prior criminal
68 activity;

69 (2) The offense was committed while the defendant was under
70 the influence of extreme mental or emotional disturbance;

71 (3) The capacity of the defendant to appreciate the criminality
72 of his or her conduct or to conform his or her conduct to the
73 requirements of law was substantially impaired;

74 (4) The age of the defendant at the time of the crime;

75 (5) The defendant acted under the substantial domination of
76 another person.

566.030. 1. A person commits the crime of forcible rape if such person has
2 sexual intercourse with another person by the use of forcible
3 compulsion. Forcible compulsion includes the use of a substance administered
4 without a victim's knowledge or consent which renders the victim physically or
5 mentally impaired so as to be incapable of making an informed consent to sexual

6 intercourse.

7 2. Forcible rape or an attempt to commit forcible rape is a felony for which
8 the authorized term of imprisonment is life imprisonment or a term of years not
9 less than five years, unless:

10 (1) In the course thereof the actor inflicts serious physical injury or
11 displays a deadly weapon or dangerous instrument in a threatening manner or
12 subjects the victim to sexual intercourse or deviate sexual intercourse with more
13 than one person, in which case the authorized term of imprisonment is life
14 imprisonment or a term of years not less than fifteen years; or

15 (2) The victim is a child less than twelve years of age, in which case [the
16 required term of imprisonment is life imprisonment without eligibility for
17 probation or parole until the defendant has served not less than thirty years of
18 such sentence or unless the defendant has reached the age of seventy-five years
19 and has served at least fifteen years of such sentence. Subsection 4 of section
20 558.019, RSMo, shall not apply to the sentence of a person who has pleaded guilty
21 to or has been found guilty of forcible rape when the victim is under the age of
22 twelve, and "life imprisonment" shall mean imprisonment for the duration of a
23 person's natural life for the purposes of this section], **the punishment shall be**
24 **either death or life imprisonment without eligibility for probation,**
25 **parole, or release except by act of the governor; except that, if a person**
26 **has not reached his or her eighteenth birthday at the time of the**
27 **commission of the crime, the punishment shall be life imprisonment**
28 **without eligibility for probation, parole, or release except by an act of**
29 **the governor.**

30 3. No person found guilty of or pleading guilty to forcible rape or an
31 attempt to commit forcible rape shall be granted a suspended imposition of
32 sentence or suspended execution of sentence.

566.060. 1. A person commits the crime of forcible sodomy if such person
2 has deviate sexual intercourse with another person by the use of forcible
3 compulsion. Forcible compulsion includes the use of a substance administered
4 without a victim's knowledge or consent which renders the victim physically or
5 mentally impaired so as to be incapable of making an informed consent to sexual
6 intercourse.

7 2. Forcible sodomy or an attempt to commit forcible sodomy is a felony for
8 which the authorized term of imprisonment is life imprisonment or a term of
9 years not less than five years, unless:

10 (1) In the course thereof the actor inflicts serious physical injury or
11 displays a deadly weapon or dangerous instrument in a threatening manner or
12 subjects the victim to sexual intercourse or deviate sexual intercourse with more
13 than one person, in which case the authorized term of imprisonment is life
14 imprisonment or a term of years not less than ten years; or

15 (2) The victim is a child less than twelve years of age, in which case [the
16 required term of imprisonment is life imprisonment without eligibility for
17 probation or parole until the defendant has served not less than thirty years of
18 such sentence or unless the defendant has reached the age of seventy-five years
19 and has served at least fifteen years of such sentence. Subsection 4 of section
20 558.019, RSMo, shall not apply to the sentence of a person who has pleaded guilty
21 to or has been found guilty of forcible sodomy when the victim is under the age
22 of twelve, and "life imprisonment" shall mean imprisonment for the duration of
23 a person's natural life for the purposes of this section], **the punishment shall**
24 **be either death or life imprisonment without eligibility for probation,**
25 **parole, or release except by act of the governor; except that, if a person**
26 **has not reached his or her eighteenth birthday at the time of the**
27 **commission of the crime, the punishment shall be life imprisonment**
28 **without eligibility for probation, parole, or release except by an act of**
29 **the governor.**

30 3. No person found guilty of or pleading guilty to forcible sodomy or an
31 attempt to commit forcible sodomy shall be granted a suspended imposition of
32 sentence or suspended execution of sentence.

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